BANK PERTANIAN MALAYSIA BHD

v.

ZULPADLI MOHAMMAD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
VT SINGHAM J
[CIVIL SUIT NO: 21NCVC-107-2011]
15 AUGUST 2011

***CIVIL PROCEDURE**: Striking out - Statement of claim - Plaintiff sued partners of legal firm for professional negligence in presentation of transfer and charge documents - Transfer and charge initially registered by relevant authority but later unilaterally cancelled - Whether viva voce evidence required to determine why registrations cancelled - Whether claim disclosed reasonable cause of action - Whether conflicting affidavit evidence raised issues on scope and duty of care owed by defendants to plaintiff*

The plaintiff sued the first three defendants ('the defendants'), who were partners in a legal firm, for professional negligence. They were instructed by the plaintiff to prepare the charge documentation in respect of two pieces of land ('the lands') while another firm of solicitors handled the transfer documentation. As was the customary practice, the defendants presented both the transfer and charge documents simultaneously to the fourth defendant for registration. The fourth defendant initially registered the transfer and charge but subsequently, and unilaterally, cancelled the registrations, the reason for which was unclear. The plaintiff contended that it was because the defendants had failed to obtain prior approval to the transfer and charge from the Estate Land Board under s. 214A read with s. 214A(2) of the National Land Code ('NLC'). The plaintiff sued the defendants for RM19,700,300, which was the amount it had released to the purported vendor of the lands on receiving confirmation from the defendants that the transfer and charge documents had been presented for registration. Contending that their duty of care to the plaintiff only extended to the preparation and registration of the charge documents and not the transfer and that the said s. 214A read with s. 214A(2) did not apply to the registration of the charge, the defendants applied under O. 18 r. 19(1) of the Rules of the High Court 1980 to strike out the plaintiff's claim alleging it failed to disclose a reasonable cause of action and that it was frivolous, vexatious and an abuse of process of court. The defendants had counterclaimed for general, exemplary and aggravated damages on the ground that the plaintiff had conspired to injure them.

Held (dismissing the application with costs):

(1) On the face of the pleadings, the plaintiff had disclosed a reasonable cause of action against the defendants and it could not be struck out summarily. The claim did not appear to be hopeless, baseless, obviously unsustainable or doomed to failure. (para 6)

(2) The conflicting affidavit evidence raised an issue on the scope and duty of care owed by the defendants to the plaintiff and whether their duty to advise the plaintiff was limited only to the preparation of the charge documents for registration or whether it included a duty to ascertain the validity and fitness of the instrument of transfer. (para 10)

(3) Both parties had through their affidavits raised mixed issues of law and fact which required *viva voce* evidence. The reason for the cancellation of the transfer and charge were unclear and had to be obtained through *viva voce* evidence. In addition, there was the report to the Land Authority and police by the registered owners of the lands that the purported transfers of the lands to the purchasers were fraudulent. (paras 13 & 17)

(4) The court was satisfied the plaintiff's claim was not scandalous, frivolous or vexatious and/or an abuse of process of the court. It was premature to assume or determine whether the plaintiff was trying to turn the defendants into a scapegoat as was alleged by the defendants. (para 17)

Case(s) referred to:

Bakar Ahmad v. Subramaniam Kanniah [1992] 4 CLJ 1833; [1992] 2 CLJ (Rep) 154 HC ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Bank Bumiputera (M) Bhd & Anor v. Lorrain Esme Osman [1987] 1 CLJ 572; [1987] CLJ (Rep) 472 HC ***(refd)***

CC Ng & Bros Sdn Bhd v. Government of State of Pahang [1985] 1 CLJ 235; [1985] CLJ (Rep) 45 FC ***(refd)***

Chase Perdana v. Md Afendi Hamdan [2009] 6 CLJ 501 HC ***(refd)***

Dyson v. AG [1911] 1 KB 410 ***(refd)***

Ibrahim Mohamad v. Ketua Polis Daerah Johor Bahru & Ors [1996] 1 LNS 177 HC ***(refd)***

Kalyani Baskar v. MS Sampoornam [2007] 2 SCC 258 ***(refd)***

Kumpulan Pembinaan (M) Sdn Bhd v. Tractors (M) Bhd [1977] 1 LNS 50 HC ***(refd)***

Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 FC ***(refd)***

Lawrence v. Lord Narreys [1890] 15 App Cas 210 ***(refd)***

Lee Nyan Choi v. Voon Noon [1978] 1 LNS 94 FC ***(refd)***

Mooney & Ors v. Peat Marwick, Mitchell & Company & Anor [1966] 1 LNS 109 ***(refd)*** *HC*
New Straits Times (Malaysia) Bhd v. Kumpulan Kertas Niaga Sdn Bhd & Anor [1985] 1 LNS 1 FC ***(refd)***
Omega Holdings Bhd v. Dato Tiah Thee Kian & Ors [2002] 7 CLJ 125 HC ***(refd)***
Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor [1996] 4 CLJ 716 FC ***(refd)***
Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat & Ors [1999] 2 CLJ 886 HC ***(refd)***
Raja Zainal Abidin Raja Haji Tachik & Ors v. British-American Life & General Insurance Bhd [1993] 3 CLJ 606 SC ***(refd)***
Sim Kie Chon v. Superintendent of Pudu Prison & Ors [1985] 2 CLJ 449; [1985] CLJ (Rep) 293 SC ***(refd)***
S Manickam & Ors v. Ismail Mohamad & Ors [1996] 1 LNS 117 HC ***(refd)***
Stamford Holdings Sdn Bhd v. Kerajaan Negeri Johor & Ors [1998] 1 CLJ 960 CA ***(refd)***
Tuan Hj Ishak Ismail v. Leong Hup Holdings Bhd & Other Appeals [1996] 1 CLJ 393 CA ***(refd)***

Legislation referred to:
National Land Code, s. 214A(1), (2)
Rules of the High Court 1980, O. 18 r. 19(1), (a), (b), (d)

For the plaintiff - Navamalar Ganesan; M/s Jasbeer Nur & Lee
For the 1st, 2nd & 3rd defendants - Yusfarizal Yusoff (Mohamad Zaid Daud & Abdullah Az Zubayr Awailuddin with him); M/s Zulpadli & Edham
For the 4th defendant - Mohd Azhari Abu Hanif (Wan Norazimin Kassim with him); FCs

Reported by Ashok Kumar

JUDGMENT

VT Singham J:

[1] By the summons in chambers dated 10 June 2011 (encl. 7), the first, second and third defendants have applied to strike out the plaintiff's statement of claim under O. 18 r. 19(1)(a) and/or (b) and/or (d) of the Rules of the High Court 1980. The grounds of the application are stated in the said "saman dalam kamar". This "saman dalam kamar" (encl. 7) supported by the affidavit affirmed by the first, second and third defendants on 10 June 2011 (encl. 8) (hereinafter referred to as 'the defendants' for the purpose of this application). The affidavit in support (encl. 8) is filed under the second and fourth limb of r. 19(1)(b) and/or (d) of the Rules of the High Court 1980 (RHC 1980). In addition to the affidavits, the defendants have filed the statement of defence and counterclaim (encl. 6) against the plaintiff's claim. By the statement of

defence and counterclaim, the defendants have pleaded that the plaintiff has committed a plot and/or conspiracy to injure the defendants. The defendants have pleaded particulars of the alleged conspiracy to sustain a claim for general damages, exemplary and aggravated damages, interests and costs. The plaintiff has filed reply and defence to defendants' counterclaim (encl. 9). The defendants have filed a reply to the plaintiff's defence to counterclaim (encl. 12).

[2] As to the application to strike out the writ and statement of claim provided under the first limb of sub r. (1)(a) of r. 19, no evidence shall be admissible, (see r. 19(2), *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor* [1996] 4 CLJ 716 FC, *Ibrahim Mohamad v. Ketua Polis Daerah Johor Bahru & Ors* [1996] 1 LNS 177 HC, at pp. 19-22, *S. Manickam & Ors v. Ismail Mohamad & Ors* [1996] 1 LNS 117 HC, at pp. 92-93). However, as the first, second and third defendants have grounded their application on other limbs, as well, namely r. 19(1)(b) and (d) of O. 18, this court has to examine the affidavit evidence filed by both parties under the said limbs. The plaintiff and defendants have filed "affidavit jawapan plaintif" (encl. 11), "afidavit balasan defendan" (encl. 13), "afidavit jawapan (2) plaintif" (encl. 14) and "afidavit tambahan defendan" (encl. 15) respectively.

[3] The plaintiff's claim against the defendants is for professional negligence, *inter alia*, for failure to ensure that there was prior approval obtained from the Estate Land Board and/or in failing to exercise reasonable care and skill to advise the plaintiff of the consequences of not having obtained the said approval before presenting the transfer Form 14A dated 18 March 2008 and the charge Form 16A dated 26 June 2008 in respect of two properties known as Geran 53020, Lot No. 886 and Geran 53021 Lot No. 887 Mukim Ulu Selangor (hereinafter referred to as "the said property") to the land authority for registration. The plaintiff's claim is for the sum of RM19,700,300 that was released to the purported vendor through the defendants who then forwarded the payment to the purported vendor's solicitors upon instructions from the defendants. The first to third defendants are sued as partners of the firm of M/s Zulpadli & Edham.

[4] As stated above, the defendants have filed this application (encl. 7) to strike out the plaintiff's writ of summons and the statement of claim on the grounds that the claim does not disclose a reasonable cause of action, it is scandalous, frivolous and vexatious and that it is an abuse of the process of the court.

Decision

[5] On going through the summons in chambers (encl. 7), the affidavit in support of the first, second and third defendants (encl. 8), affidavit jawapan plaintif (encl. 11), afidavit balasan defendan-defendan (encl. 13), afidavit jawapan (II) plaintif (encl. 14), afidavit tambahan defendan-defendan (encl. 15), the skeletal submissions of the defendants (encl. A), ikatan otoriti defendan-defendan (encl. A1), the chronology of the defendants' case (encl. A2), plaintiff's skeletal submission (encl. B), plaintiff's bundle of authorities (encl. B1), chronology of the plaintiff's case (encl. B2), plaintiff's bundle of authorities (II) (encl. B3), ikatan otoriti tambahan untuk defendan (encl. A3), defendants' further skeleton (encl. C), ikatan otoriti tambahan (II) defendan-defendan (encl. C1) and plaintiff's supplementary submission (encl. C2), the decision of this court is:

[6] On the first ground under O. 18 r. 19(1)(a), this court must state on the face of the pleadings, the plaintiff's claim does not appear to be hopeless, baseless or obviously unsustainable or doom to fail. This court finds that the pleadings has disclosed a reasonable cause of action against the defendants to justify a trial and is not a claim where on the face of it, it is plain and obviously unsustainable or is obviously and almost incontestably bad. (see *New Straits Times (Malaysia) Bhd v. Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 LNS 1; [1985] 1 MLJ 226 at p. 227, *Dyson v. AG* [1911] 1 KB 410 at p. 419, *Lawrence v. Lord Narreys* [1890] 15 App Cas 210 at p. 219). However it must be made clear that this court has not made any findings on the merits of the plaintiff's claim ie, as to whether the plaintiff would succeed or not at the close of the plaintiff's case or at the conclusion of the trial as it is not the function of this court to consider the merits of the case at this stage of the proceeding as long as the statement of claim discloses some reasonable cause of action against the defendants to proceed to trial (see *Stamford Holdings Sdn Bhd v. Kerajaan Negeri Johor & Ors* [1998] 1 CLJ 960 CA, which had followed the legal principle in *Mooney & Ors v. Peat Marwick, Mitchell & Company & Anor* [1966] 1 LNS 109; [1967] 1 MLJ 87, at p. 88E-F, *Bank Bumiputera (M) Bhd & Anor v. Lorrain Esme Osman* [1987] 1 CLJ 572; [1987] CLJ (Rep) 472 HC, *Bakar Ahmad v. Subramaniam Kanniah* [1992] 4 CLJ 1833; [1992] 2 CLJ (Rep) 154; [1992] AMR 283 at p. 285, *Tuan Hj Ishak Ismail v. Leong Hup Holdings Bhd & Other Appeals* [1996] 1 CLJ 393; [1996] 1 MLJ 661 at p. 662-663). In the present case, this court finds that on the face of the pleadings, the plaintiff has disclosed a reasonable cause of action against the defendants and it cannot be struck out summarily.

[7] As to the other grounds as raised in the summons in chambers (encl. 7), the defendants have made reference to several documents and materials which require close examination of the same and in some instances, require cross examination and scrutiny of the witnesses and/or makers of the documents in order for this court to make a finding as to the probabilities of the parties' case. The evidence raised by the plaintiff and the defendants in their affidavits and affidavit in reply appears to be conflicting in terms of the factual matrix, background, construction of documents and interpretation of statutory terms. On this ground itself, this summary disposal of the plaintiff's claim under O. 18 r. 19(1)(b) and (d) is not appropriate as the plaintiff should not be shut out from the judgment seat summarily.

[8] This court finds that the plaintiff has raised questions and issues in terms of the extent of the defendants' duty of care towards their clients, the plaintiff, in the preparation of the charge documents (exh. ZE7) and advice. The plaintiff has also raised an issue as to whether the duty to advise the plaintiff includes a duty to check on the validity and fitness of the instrument of transfer (exh. ZE6) of the property which was presented for registration by the defendants without having been obtained approval of such transfer from the Estate Land Board as required by s. 214A(1) of the National Land Code and which requires *viva voce* evidence, (see *Chase Perdana v. Md Afendi Hamdan* [2009] 6 CLJ 501).

[9] It is important to state that where the completion of a transfer or conveyance of property takes place simultaneously or at/about the time close to the preparation of the charge, it seems to be the practice unless agreed otherwise, of the transfer documents to be handed to the chargee's solicitors as their security and for the chargee's solicitors to commonly present both the instrument of the transfer and the charge to the Land Authority for registration. However the obligation of the chargee's solicitors to ensure that both the documents are presented for registration before the loan which has been granted to the chargor is released is subject to the terms and understanding between the purchaser's solicitors and the chargee's solicitors whether it is in order for the chargee to release the facility granted to the chargor or to the vendor's solicitors towards payment of the purchase price of the property.

[10] Upon considering the plaintiff's claim with the affidavit evidence, this court finds that the conflicting affidavit evidence has raised an issue on the scope and duty of care owed to the plaintiff by the defendants and whether their duty to advise the plaintiff is confined or limited to the preparation of the charge documents dated 26 June 2008 for

presentation to the Land Authority for the registration or does it include the duty to ascertain the validity and fitness of the instrument of transfer dated 18 March 2008. In the present case, it is not in dispute that the said transfer documents were prepared by another firm of solicitors and that it was not the defendants. Nevertheless, the fact which remain intact is that the said transfer documents were handed to the defendants to be presented together with the said charge documents prepared by the defendants for registration. On presentation of both the transfer and charge documents for registration to the Land Authority, the defendants had advised the plaintiff to release the loan amount to the vendor. Accordingly the sum of RM19,700,300 million was released to the purported vendor through the defendant's firm who had sent the payment to the purported vendor's solicitors.

[11] There is also no dispute that both the transfer and charge documents were registered by the Land Authority, the fourth defendant upon presentation by the defendants and this was confirmed by the fourth defendant, Pendaftar Hakmilik Pejabat Tanah Negeri Selangor by the letter dated 3 July 2008 (exh. ZE7). However, it would appear that the registrations of both the transfer and charge documents were subsequently and unilaterally cancelled by the fourth defendant. Unfortunately, the reason for the cancellation of the registration of both the transfer and charge documents still remains unclear except that it has been alleged by the plaintiff that the fourth defendant was also negligent when the transfer and charge documents were registered without the approval from the Estate Land Board as required under s. 214A (1) to be read with s. 214A(2) of the National Land Code. As to the subsequent cancellation of both the transfer and charge documents by the fourth defendant, it is not clear at this stage as to the reason, and seems to be conflicting or the unilateral cancellation of the registration of both the documents ie, whether it was due to the complaint of the original registered owners of the property upon discovery of a fraudulent transaction in respect of a transfer of the property which the original owners claimed was never sold or transferred to the purported purchasers or was it due to an invalid instrument of transfer of the property on the ground that there was no prior approval having been obtained from the Estate Land Board pursuant to s. 214A(1) of the National Land Code to be read with s. 214A(2) of the same code.

S. 214A(1) states:

> Notwithstanding anything contained in this Act, no estate land is capable of being transferred, conveyed or disposed of in any manner whatsoever unless approval of such transfer, conveyance or disposal has first been obtained from the Estate Land Board (hereinafter referred to as "the Board") established under sub-s. (3).

A [Am. Act A1104 - Prior text read - "(1) Notwithstanding anything contained in this Act, no estate land is capable of being transferred, conveyed or disposed of in any manner whatsoever, to two or more persons unless approval of such transfer, conveyance or disposal has first been obtained from the Estate Land Board (hereinafter referred to as "the Board") established under sub-s. (3)."]

B S. 214A(2) states that:

The Registrar shall not register any instrument of transfer of such land under Part Eighteen of this Act unless such instrument is accompanied by a certificate of approval granted by the Board.

C **[12]** This court finds that the evidence as to the preparation of the transfer documents and the preparation of the charge documents in respect of the property has to be considered on its totality although it must be made clear that there were two separate firms of solicitors who had prepared the documents and that the defendants were instructed by D the plaintiff to prepare and process only the charge documents for registration in favour of the plaintiff.

[13] This court finds that the issues raised by both parties through their respective affidavits have raised both mixed issues of law and facts E which requires *viva voce* evidence and also the issue of a causative link on the duty of care owed to the plaintiff which has been allegedly imposed upon the defendants for failure to ascertain the validity and fitness of the instrument of transfer without the approval of the Estate Land Board which seems to have imposed a duty of care upon F the defendants to have advised the plaintiff accordingly. (*See Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305; [1997] 2 MLJ 565, at p. 588, *CC Ng & Bros Sdn Bhd v. Government of State of Pahang* [1985] 1 CLJ 235; [1985] CLJ (Rep) 45; [1985] 1 MLJ 347, at p. 350, *Lee Nyan Choi v. Voon Noon* [1978] 1 LNS 94 FC, *Owen Sim Liam Khui v. Piasau Jaya Sdn Bhd & Anor* [1996] 4 CLJ 716; G [1996] 1 MLJ 113 at p. 136). There also appears to be arguably some nexus or proximity to the plaintiff's claim against the defendants as under the column of the first schedule to the "lampiran" which is attached to the charge and seen at p. 234 of the affidavit in support (encl. 8), it is stated the applicable Act is the National Land Code. H Accordingly, this court finds that this is also an issue which requires *viva voce* evidence on the part of the defendants, as to the relevance of having included the same applicable Act, as being the National Land Code and at the same time stating that s. 214A(1) to be read together with s. 214A(2) of the code does not apply to the registration of the I charge documents. Accordingly, the defendant have contended that they

do not owe to the plaintiff a duty of care to check on the approval of the Estate Land Board as required under the said code. On the other hand, the plaintiff has alleged that the defendants have neglected to advise them of the requirement of the approval of the Estate Land Board under s. 214A(1) to be read with s. 214A(2) of the code.

[14] In any event, in so far as the plaintiff's claim, this court finds that the evidence produced by the affidavits and documentary by both parties has raised conflicting evidence which requires examination and cross examination of the parties and their witnesses which include the fourth defendant as well, in order for this court to determine if there is any liability imposed upon the fourth defendant for the cancellation of the registration of both the transfer and charge documents which had resulted in the losses as claimed by the plaintiff, particularly, when the charge document was unilaterally cancelled by the fourth defendant after the loan had been released on the advise of the defendants.

[15] The principles of law on striking out pleadings, statement of claim or defence or counterclaim are settled by several case laws reported in the local law journals and in other Commonwealth jurisdiction although the application of the principles of law is to be determined on the facts and surrounding circumstances of each case, in other words, it is on a case to case basis. (see *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 SC, *Kumpulan Pembinaan (M) Sdn Bhd v. Tractors (M) Bhd* [1977] 1 LNS 50; [1978] 2 MLJ 113 at p. 115, *Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat & Ors* [1999] 2 CLJ 886 HC).

[16] On the **first limb**, under O. 18 r. 19(1)(a) of the RHC 1980, this court finds that the plaintiff's statement of claim against the defendants on the face of it has raised a reasonable cause of action which requires the plaintiff to be given an opportunity to establish the claim through *viva voce* evidence. On the face of the pleading, this court is satisfied that it is not an appropriate case to shut out the plaintiff by striking out the plaintiff's claim against the defendants as the claim cannot be said to be obviously so plain, baseless or unsustainable. However, it must be made clear once again that at this stage; it is not the function of this court to decide whether the plaintiff will succeed in their claim against the defendants as that is a matter to be decided at the close of the plaintiff's case or at the conclusion of the trial.

[17] As to the second and fourth limbs, under O. 18 r. 19(1)(b) and (c) of the RHC 1980 relied on by the defendants, this court is satisfied that the plaintiff's claim is not scandalous, frivolous or vexatious and/or an abuse of a process of the court. In fact, it is premature to assume or determine whether the plaintiff is trying to turn the defendants into a scapegoat as alleged by the defendants.

[18] This court has critically examined the affidavit evidence together with the documents as raised in the affidavits of both parties and find that the plaintiff should be accorded the opportunity to establish the claim after taking *viva voce* evidence. This court wishes to reiterate that the lengthy affidavits and the various exhibits attached to the affidavits has disclosed conflicting material evidence which requires the issues to be resolved through discovery process and subject the deponents to cross examination and/or calling of material witnesses, (see *Omega Holdings Bhd v. Dato Tiah Thee Kian & Ors* [2002] 7 CLJ 125 HC; at p. 26) This court cannot conduct the trial on the silent cold-printed or type-written words as contained in the opposing affidavits where there are serious disputes or conflicts on the material facts, which this court is of the considered view, requires a decisive consideration of the case of the parties.

In the case of *Eng Mee Yong v. Letchumanan* [1979] 1 LNS 18, the Privy Council said at p. 217

> Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be. In making such order on the application as he "may think just" the judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient *prima facie* plausibility to merit further investigation as to their truth.

[19] There is also the issue, as to whether it is fair and reasonable to expect the defendants, who were merely instructed by the plaintiff to prepare the charge documents for registration, to owe the plaintiff the duty of care to have advised on the validity and fitness if the instrument of the transfer fore registration and if it has complied with the requirement of s. 214A to be read with s. 214A(2) of the National Land Code. As stated above this is a legal issue and the findings of this court will depend much on the totality of the facts and surrounding circumstances in order to decide on the scope of the duty of care owed to the plaintiff by the defendants. Consequently, the findings of this court must necessarily be on the liability of the defendants to the plaintiff for the cancellation of the registration of the instrument of charge which no doubt was consequent to the cancellation of the instrument of

transfer by the fourth defendant. This court wishes to emphasis that the reason or reasons of the cancellation of both the instrument of transfer of charge is not clear and this court is unable to ascertain the reason or reasons from the affidavit evidence. Therefore, the reason or reasons for the cancellation of the said registration will have to be obtained through *viva voce* evidence. In addition, there also exists fraudulent transfer of the property to the purchasers which was reported to the Land Authority and the police by the registered owners of the property. Nevertheless, in all fairness to the defendants it is important for this court to immediately state that there is presently no evidence to implicate the defendants to the alleged fraudulent transfer of the property and arguably, and depending on a evidence to be produced, it may absolve the defendant of any liability if the cancellation of the said registration by the fourth defendant was due to the discovery of the fraudulent transfer of the property. In any event, the plaintiff has raised the issue of non-compliance of the requirement to obtain the approval of the Land Estate Board pursuant to s. 214 of the National Land Code which is seen to suggest that the defendants owed the plaintiff a duty of care to have advised on the statutory requirement for the approval of the Land Estate Board in order for the instrument of the transfer of the property to be valid and fit for registration. The plaintiff has also contended that the approval of the Land Estate Board is also necessary for the registration of the instrument of charge which is debatable and subject to further arguments on that issue. In the circumstances and taking into consideration both the factual matrix and the legal issues cumulatively on the whole transaction until the time of the cancellation of both the instrument of transfer and the charge by the fourth defendant and argument advanced on behalf of the parties, this court wishes to reiterate that these are matters which certainly require *viva voce* evidence and that it is not appropriate and safe to dispose the plaintiff's claim summarily.

[20] Cases referred to and relied on by learned counsel for the defendants can be distinguished on the set of facts and circumstances and do not support the defendant's contention to strike out the plaintiff's claim except that the principles of law or the *ratio decidendi* is binding upon this court.

[21] In determining the scope of the duty of care owed to the plaintiff by the first to third defendants in the circumstances of the case, this court has to also consider the elements of foreseeability, proximity and no doubt the requirement of fairness, reasonableness and justice of the case. All this factors for consideration can only be derived from *viva voce* evidence and in order for this court to arrived at a just decision.

[22] In the circumstances, this court is of the considered view the plaintiff ought to be accorded a fair hearing in accordance with the due process of law as the facts and circumstances of this case justifies a trial and a denial of that rightful trial would mean denial of fair trial. (See *Kalyani Baskar v. MS Sampoornam* [2007] 2 SCC 258 at 262) and that justice demands that the court adjudicate upon the dispute and should not shut the doors of justice. On the other hand, if this court were to find that there is no real dispute of the factual matrix of the case and that a party has been unnecessarily named, this court will no doubt be firm and ensure that there is no abuse of the process of the court and will act accordingly.

In *Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed* [1998] 2 CLJ 340 CA, the Court of Appeal said at p. 352:

> Every person who is aggrieved by some wrong he considers done him is at liberty to invoke the process of the court. Equally may a litigant invoke the process to enforce some claim which he perceives he has against another. When however, the process of the court is invoked, not for the genuine purpose of obtaining the relief claimed, but for a collateral purpose, for example, to oppress the defendant, it becomes an abuse of process. Where the court's process is abused, the proceedings complained of may be stayed, or if it is too late to grant a stay, the party injured may bring an action based on the tort of collateral abuse of process.
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> The position has been neatly summed up by Lord Denning MR in his dissenting judgment in *Goldsmith v. Sperrings Ltd & Ors* [1977] 1 WLR 478, where at p. 489 he said:
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> > In a civilized society, legal process is the machinery for keeping and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abused when it is diverted from its true course so as to serve extortion or oppression: or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. The judges can and will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer.
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> Though a dissenting judgment, the principle enunciated by the Master of the Rolls has been accepted as authoritative of what constitutes an abuse of process ...

[23] Be that as it may, in the present case, on the face of the statement of claim, this court is satisfied that the plaintiff has a reasonable cause of action against the defendants and the claim ought

not to be struck out. As for the other grounds, ie, the second and fourth limbs under O. 18 r. 19(1)(b) and (d), this court is also satisfied that the plaintiff has succeeded that the plaintiff's claim against the defendant is not scandalous, frivolous and/ or vexatious or is baseless or without any legal foundation or otherwise an abuse of the process of the court and that it cannot be sustained, (see *Sim Kie Chon v. Superintendent of Pudu Prison & Ors* [1985] 2 CLJ 449; [1985] CLJ (Rep) 293; [1985] 2 MLJ 385, p. 386, *Raja Zainal Abidin Raja Haji Tachik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 CLJ 606; [1993] 3 MLJ 16, at p. 23)

[24] In accordance with the rules of reasons and justice, saman dalam kamar (encl. 7) is dismissed with costs. However, as much as this court appreciates the predicament and the dilemma faced by the first to third defendants, being professionals in the practice of law, this case hanging over their head, this court cannot hurry justice to dispose of this case summarily or in accordance with the procedure as applied by the defendants as 'justice hurried is justice buried'. Nevertheless, this court is agreeable to set an early date of trial to dispose off this case. Accordingly, an early date for the trial of this case is set today.